

<sup>2</sup> The Board notes that, following the April 2, 2020 decision, OWCP received additional evidence. However, the Board’s *Rules of Procedure* provides: “The Board’s review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal.” 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

\$2,400.23 for the period January 10 through February 1, 2020, for which he was without fault, because he continued to receive compensation following his return to work; and (3) whether OWCP properly denied waiver of recovery of the overpayment.

### **FACTUAL HISTORY**

On May 26, 2010 appellant, then a 37-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date he injured his left lower extremity when he fell when descending stairs while in the performance of duty. He stopped work on that date. OWCP accepted the claim for left lateral collateral ligament knee sprain, left cruciate ligament knee sprain, left knee tear of the medial meniscus, left knee internal derangement, left metatarsophalangeal sprain of the foot, sprain of the lumbosacral joint and ligament, gait abnormality, right foot sprain, and right knee and leg sprain. It paid appellant wage-loss compensation on the supplemental rolls as of July 12, 2010 and on the periodic rolls as of February 13, 2011.

On February 5, 2014 OWCP referred appellant to Dr. Edward Gold, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated February 26, 2014, Dr. Gold indicated that appellant could return to full-time work with restrictions of no pushing, pulling, or lifting of more than 35 pounds and limited kneeling, bending, and squatting. In an accompanying work capacity evaluation for musculoskeletal conditions (Form OWCP-5c), Dr. Gold determined that appellant's restrictions were permanent and that maximum medical improvement (MMI) had been reached.

On March 4, 2014 OWCP referred appellant for vocational rehabilitation to find a suitable position within the restrictions provided by Dr. Gold on February 26, 2014.

On August 13, 2014 a vocational rehabilitation counselor conducted a labor market survey for employment as a substance abuse counselor and school counselor within appellant's commuting area. In a proposal for a training plan of the same date, the vocational rehabilitation counselor proposed that appellant undergo two years of college training to secure an associate's degree in human services. The proposed training plan would begin on August 19, 2014 and continue through May 15, 2016.

In a February 22, 2015 report, the vocational rehabilitation counselor noted that appellant had been in classes for three weeks and had obtained an internship with the Virginia Department of Probation and Parole. In a March 23, 2015 report, the vocational rehabilitation counselor noted that appellant was training for work as a substance abuse counselor, probation officer, or Department of Veterans Affairs (VA) case manager, as sponsored by the VA.

On May 31, 2016 the vocational rehabilitation counselor recommended, at appellant's request, an extension of his training status to secure a bachelor's degree in social work beginning August 2016 with a completion date of December 2018. The vocational rehabilitation counselor noted that appellant had graduated with an associate's degree in human services as of May 1, 2016.

In a report dated September 24, 2016, the vocational rehabilitation counselor noted that the plan for appellant to extend his training to secure a bachelor's degree, with classes beginning August 29, 2016, had been approved.

In a rehabilitation action report dated September 6, 2019, the vocational rehabilitation counselor noted that appellant completed his training program on May 31, 2019 and received a Bachelor of Arts degree majoring in criminal justice. He completed a classification form (Form CA-66) dated June 15, 2019 for the position of probation parole officer. The position was sedentary and required no kneeling, stooping, or crouching. The vocational rehabilitation counselor advised that appellant met the specific vocational preparation required for this position based on his prior office experience. He opined that the position was reasonably available within appellant's commuting area, noting labor market review and offerings posted on a Virginia Government job listing web site. The vocational rehabilitation counselor advised that the weekly wage for this position was \$812.25 and that the source for this wage data was Virginia Vital Information for Education and Work, obtained on June 15, 2019.

On October 14, 2019 OWCP referred appellant to Dr. James Schwartz, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated November 22, 2019, Dr. Schwartz indicated that appellant was capable of working eight hours per day in a sedentary position. In an attached Form OWCP-5c, he indicated: appellant had permanent sedentary work restrictions including walking, standing, and bending/stooping no more than 2 hours per day; and pushing, pulling, and lifting no more than 10 pounds for 3 hours per day. Dr. Schwartz indicated that appellant had reached MMI.

In a job offer dated December 18, 2019, the Commonwealth of Virginia's Department of Corrections offered appellant a position as a probation and parole officer, effective January 10, 2020. His semi-monthly salary offer was \$1,572.54, which converted to an annual salary of \$37,741.00.

On January 10, 2020 appellant began full-time employment as a probation and parole officer with the Commonwealth of Virginia's Department of Corrections.

In an automated compensation payment system form dated January 30, 2020, OWCP calculated that appellant received an overpayment in the amount of \$2,400.23 for the period January 10 through February 1, 2020.<sup>3</sup>

By letter dated February 27, 2020, OWCP advised appellant of its preliminary determination that he received an overpayment of compensation in the amount of \$2,400.23 because he received wage-loss compensation for total disability for the period January 10 through February 1, 2020 after he had returned to full-time work. It also made a preliminary finding that he was without fault in the creation of the overpayment as there was no evidence in the case file to demonstrate that he knew, or should have known, the proper course of action to be followed. OWCP advised appellant that he could submit evidence challenging the fact, amount, or finding of fault, and request waiver of recovery of the overpayment. It requested that he complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation. Additionally, OWCP provided an overpayment action request form and notified

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<sup>3</sup> The case record reflects that from January 5 through February 1, 2020 appellant received a periodic rolls net payment of \$2,922.02.

appellant that, within 30 days of the date of the letter, he could request a final decision based on the written record, or a prerecoument hearing. No response was received.

In an e-mail dated March 19, 2020, the employing establishment informed OWCP that appellant's pay rate for his date-of-injury position at the employing establishment was \$27.17 per hour, which converted to an annual salary of \$56,508.00.

By decision dated March 20, 2020, OWCP found that appellant was able to perform the duties of the position of probation and parole officer and reduced his compensation effective January 10, 2020. It found that the weight of medical evidence with regard to appellant's work restrictions rested with Dr. Gold and that the physical requirements of the position did not exceed appellant's limitations. OWCP found that the position of probation and parole officer fairly and reasonably represented appellant's wage-earning capacity based upon the wages actually earned. It stated that appellant was entitled to compensation from January 10, 2020 based upon his actual earnings at that time. OWCP calculated that his gross compensation rate should be adjusted to \$1,182.00 every four weeks. It indicated that appellant's salary as of July 12, 2010, the date he stopped working, was \$1,050.37 per week; that his current adjusted pay rate for his job on the date of injury was \$1,086.80; and that he was currently capable of earning \$725.79 per week, the rate of a probation and parole officer. OWCP, therefore, determined that appellant had a 67 percent wage-earning capacity, which when multiplied by 75 percent, amounted to a weekly compensation rate, with cost-of-living adjustments, of \$295.50, and a new compensation rate every four weeks of \$1,182.00. Appellant's loss of wage-earning capacity (LWEC) per week was calculated as \$346.62. OWCP found that his current adjusted net compensation rate "each four weeks" was \$545.62.

By decision dated April 2, 2020, OWCP finalized the preliminary overpayment determination, indicating that appellant had received an overpayment of compensation in the amount of \$2,400.23 for the period January 10 through February 1, 2020. It further found that he was not at fault in the creation of the overpayment because he received a compensation payment deposited by electronic funds transfer (EFT) and less than 30 days had elapsed since the EFT deposit was made, which did not allow ample time to receive and review a statement from his financial institution showing the details of the improper payment. OWCP noted that appellant had not responded to its preliminary overpayment determination and, thus, there was no evidence to support that the overpayment should be waived. It ordered that he should repay the overpayment in its entirety.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8115(a) of FECA provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by the employee's actual earnings if the actual earnings fairly and reasonably represent the employee's wage-earning capacity.<sup>4</sup> Generally, wages actually earned are the best measure of a wage-earning capacity, and in the absence of

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<sup>4</sup> 5 U.S.C. § 8115(a); *Loni J. Cleveland*, 52 ECAB 171 (2000).

showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such a measure.<sup>5</sup>

OWCP's procedures state that, after a claimant has been working for 60 days, it will make a determination as to whether actual earnings fairly and reasonably represent wage-earning capacity.<sup>6</sup> The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick* decision,<sup>7</sup> has been codified at section 10.403 of OWCP regulations. OWCP first calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the current pay rate for the date-of-injury position.<sup>8</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that OWCP has met its burden of proof to reduce appellant's wage-loss compensation, effective January 10, 2020, based on his actual earnings as a probation and parole officer, which fairly and reasonably represented his wage-earning capacity.<sup>9</sup>

The record reflects that Drs. Gold and Schwartz provided permanent work restrictions that prohibited appellant from performing the duties of his date-of-injury position as a letter carrier. They advised that appellant could still perform sedentary full-time work.

OWCP properly determined that appellant had the physical capacity to perform the duties of a probation and parole officer. The position was classified as sedentary and required no kneeling, stooping, or crouching. The restrictions of Drs. Gold and Schwartz fall within these sedentary work requirements. There is no contradictory medical evidence of record. The Board, therefore, finds that the weight of the medical evidence, as represented by Drs. Gold and Schwartz, establishes that appellant had the physical capacity to perform the duties of the actual earnings position.<sup>10</sup>

The record reflects that appellant obtained a bachelor's degree majoring in criminal justice during the course of his vocational rehabilitation. This degree and his prior office experience established that he had the requisite physical ability, skill, and experience to perform the position of probation and parole officer. Appellant obtained employment as a probation and parole officer

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<sup>5</sup> *Lottie M. Williams*, 56 ECAB 302 (2005).

<sup>6</sup> See *L.J.*, Docket No. 14-0970 (issued August 21, 2014); Federal (FECA) Procedure Manual, Part 2-- Claims, *Determining Wage-Earning Capacity Based on Actual Earnings*, Chapter 2.815.2(b) (June 2013).

<sup>7</sup> 5 ECAB 376 (1953); 20 C.F.R. §§ 10.403(d)-(e).

<sup>8</sup> See 20 C.F.R. § 10.403(d). The pay rate for compensation purposes is then multiplied by the wage-earning capacity percentage. This amount is subtracted from the pay rate for compensation purposes to determine the loss of wage-earning capacity. *Id.* at § 10.403(e). The Board notes that under FECA, the term disability is defined as an inability, due to an employment injury, to earn the wages the employee was receiving at the time of the injury, *i.e.*, an impairment resulting in an LWEC. See generally, *Y.O.*, Docket No. 16-1886 (issued February 24, 2017); *Prince W. Wallace*, 52 ECAB 357 (2001).

<sup>9</sup> See *S.C.*, Docket No. 19-1680 (issued May 27, 2020); *B.B.*, Docket No. 16-1814 (issued April 6, 2017).

<sup>10</sup> See *C.H.*, Docket No. 19-0136 (issued May 23, 2019).

with the Commonwealth of Virginia and began work on January 10, 2020 with a biweekly actual earnings of \$1,572.54, which converted to an annual salary of \$37,741.00. Appellant had worked in the position for more than 60 days, from January 10 until March 20, 2020 when OWCP determined that appellant's actual earnings fairly and reasonably represented his wage-earning capacity. OWCP utilized appellant's actual earnings as a probation and parole officer and properly found that these earnings fairly and reasonably represented his wage-earning capacity.<sup>11</sup>

The Board finds that OWCP properly applied the *Shadrick* formula, as codified in section 10.403 of its regulations,<sup>12</sup> in determining appellant's LWEC. OWCP calculated that his gross compensation rate should be adjusted to \$1,182.00 every four weeks using the *Shadrick* formula. It indicated that appellant's salary as of July 12, 2010, the date he stopped working, was \$1,050.37 per week; that his current adjusted pay rate for his job on the date of injury was \$1,086.80; and that he was currently capable of earning \$725.79 per week, the rate of a probation and parole officer. OWCP, therefore, determined that appellant had 67 percent wage-earning capacity, which when multiplied by 75 percent, amounted to a weekly compensation rate, with cost-of-living adjustments, of \$295.50. Appellant's LWEC per week was calculated as \$346.62. OWCP found that his current adjusted net compensation rate every four weeks was \$545.62. It properly applied the *Shadrick* formula in calculating appellant's LWEC and properly found that his actual earnings in the position of probation and parole officer fairly and reasonably represented his wage-earning capacity.<sup>13</sup>

OWCP properly found that appellant was no longer totally disabled from work as a result of his accepted condition and it followed established procedures for determining his employment-related loss of wage-earning capacity. The Board, therefore, finds that OWCP met its burden of proof to reduce appellant's compensation in its March 20, 2020 LWEC determination.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his or her duty.<sup>14</sup> Section 8129(a) of FECA provides, in pertinent part, that when an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.<sup>15</sup>

Section 10.500 of OWCP's regulations provides that compensation for wage loss due to disability is available only for periods during which an employee's work-related medical condition

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<sup>11</sup> *Supra* note 4.

<sup>12</sup> *Supra* notes 7-8.

<sup>13</sup> *Supra* notes 6-7; *see A.M.*, Docket No. 14-0161 (issued May 13, 2014).

<sup>14</sup> 5 U.S.C. § 8102(a).

<sup>15</sup> *Id.* at § 8129(a).

prevents him or her from earning the wages earned before the work-related injury.<sup>16</sup> A claimant is not entitled to receive temporary total disability (TTD) benefits and actual earnings for the same time period.<sup>17</sup> OWCP's procedures provide that an overpayment of compensation is created when a claimant returns to work, but continues to receive wage-loss compensation for TTD.<sup>18</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that OWCP properly determined that appellant received an overpayment of compensation for the period January 10 through February 1, 2020, for which he was without fault, because he continued to receive compensation following his return to work.

The evidence of record establishes that appellant returned to work as a probation and parole officer as of January 10, 2020, but he continued to receive wage-loss compensation for total disability through February 1, 2020. As noted above, a claimant is not entitled to receive compensation for total disability during a period in which he had actual earnings. Thus, an overpayment of compensation was created in this case.<sup>19</sup>

The Board further finds, however, that this case is not in posture for decision with regard to the amount of the overpayment.

After OWCP issued its February 27, 2020 preliminary overpayment determination, but before it finalized its overpayment determination on April 2, 2020, it reduced appellant's entitlement to compensation based upon his actual earnings as a probation and parole officer by decision dated March 20, 2020. In this LWEC determination, it found that appellant remained entitled to compensation from January 10, 2020 based upon his actual earnings. However, in its finalized overpayment determination dated April 2, 2020, OWCP did not consider that appellant remained entitled to a portion of his compensation based on the retroactive LWEC.<sup>20</sup> Instead, it calculated the overpayment amount as though appellant were entitled to zero compensation for the period after he returned to work as a probation and parole officer on January 10, 2020.

As OWCP did not consider the intervening reduction in appellant's entitlement to compensation based on LWEC in its finalized overpayment decision of April 2, 2020, the Board is unable to determine the proper amount of overpayment for the period January 10 through February 1, 2020. A claimant is entitled to an overpayment decision that clearly explains how the

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<sup>16</sup> 20 C.F.R. § 10.500(a).

<sup>17</sup> See *L.T.*, Docket No. 19-1389 (issued March 27, 2020); *C.H.*, Docket No. 19-1470 (issued January 24, 2020); *L.S.*, 59 ECAB 350, 352-53 (2008).

<sup>18</sup> *L.T.*, *id.*; *C.H.*, *id.*; Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Identifying and Calculating an Overpayment*, Chapter 6.200.1(a) (September 2018).

<sup>19</sup> See *E.R.*, Docket No. 19-1365 (issued December 23, 2019); *J.L.*, Docket No. 18-1266 (issued February 15, 2019); *K.E.*, Docket No. 18-0687 (issued October 25, 2018); *B.H.*, Docket No. 09-0292 (issued September 1, 2009); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.1(a) (September 2018).

<sup>20</sup> See *D.H.*, Docket No. 16-0128 (issued April 8, 2016).

amount was calculated.<sup>21</sup> The Board, therefore, finds that OWCP has not established the amount of the overpayment in question.

The case will be remanded to OWCP for recalculation of the amount of the overpayment, to be followed by a new preliminary notice of overpayment and a *de novo* overpayment decision.

### **CONCLUSION**

The Board finds that OWCP has met its burden of proof to reduce appellant's wage-loss compensation, effective January 10, 2020, based on his actual earnings as a probation and parole officer. The Board further finds that OWCP properly determined that an overpayment of compensation was created for the period January 10 through February 1, 2020, for which he was without fault; however, the Board finds that the case is not in posture for decision regarding the amount of the overpayment.<sup>22</sup>

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<sup>21</sup> See *M.M.*, Docket No. 17-0560 (issued August 23, 2017); *R.H.*, Docket No. 08-2025 (issued July 20, 2009); see also *O.R.*, 59 ECAB 432 (2008).

<sup>22</sup> In light of the Board's disposition of Issue 2, Issue 3 is rendered moot.



**ORDER**

**IT IS HEREBY ORDERED THAT** the March 20, 2020 decision of the Office of Workers' Compensation Programs is affirmed, and the April 2, 2020 decision of OWCP is affirmed in part and set aside in part and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 10, 2021  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board